(3)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

JAMES D. RUPPERT
1063 East Second Street
P.O. Box 369
Franklin, Ohio 45005
(513) 746-2832

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

QUESTION PRESENTED

WHETHER THE DETENTION OF A MOTORIST AFTER THE COMPLETION OF A VALID TRAFFIC STOP FOR SPEEDING, SOLELY FOR THE PURPOSES OF VIDEOTAPING THE QUESTIONING OF SAID MOTORIST ABOUT CONTRABAND, DRUGS, OR WEAPONS, WHICH CULMINATED IN THE CONSENT OF THE MOTORIST TO SEARCH HIS VEHICLE, VIOLATES THE CONSTITUTIONALLY GUARANTEED RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES, PURSUANT TO THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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STATEMENT OF THE CASE

This case arises from the illegal detention and search of the vehicle of Respondent, Robert D. Robinette. Mr. Robinette was returning from a weekend trip to Chicago on August 3, 1992. He was traveling on I-70 within Montgomery County, Ohio, at the time of the incident. Deputy Newsome of the Montgomery County Sheriff's Office was on drug interdiction patrol on I-70 on the date in question. Newsome clocked Mr. Robinette's vehicle traveling at 69 miles per hour in a construction zone where the speed had been reduced to 45 miles per hour.

Newsome pulled Mr. Robinette over solely for a speeding violation. Newsome admitted that no other violation had occurred and that he was only going to give Mr. Robinette a verbal warning for the speeding violation. He requested Mr. Robinette's license, returned to his vehicle, and ran a LEADS check on the license. Finding no violations, Newsome should have merely returned the license and issued his warning, thereby allowing Mr. Robinette to continue on his way.

However, because of his involvement with a drug interdiction task force, Newsome retained the license and asked Mr. Robinette to exit the vehicle and stand in front of his cruiser. Newsome then returned to his cruiser and activated a video camera. He then returned to Mr. Robinette and questioned him as to the presence of drugs, contraband, and weapons in his vehicle. Subsequently, Newsome obtained Mr. Robinette's consent to search the vehicle. The search revealed a small quantity of methamphetamine (MDMA or Ecstasy), one-half of a pill located in a film container in the vehicle. Mr. Robinette

was subsequently arrested and charged with a violation of Ohio Revised Code section 2925.11(A), a felony of the fourth degree.

The timing of the scenario was critical in the decision of the court below. Newsome's request immediately followed the warning about speeding:

> Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Mr. Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.
>
> ***One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?***

See Appendix (*State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Transcript of Videotape, Joint Exhibit A, pages 3-4).

An indictment was later returned against Mr. Robinette. A Motion to Suppress was filed on the basis that Newsome's actions violated the Fourth Amendment. After an evidentiary hearing at which a videotape of the incident was admitted, the trial court overruled the motion to suppress. Robinette pleaded no contest and

was found guilty by the trial court. Robinette subsequently appealed to the Ohio Second District Court of Appeals, which reversed the trial court, ruling that the search of the vehicle resulted from an unlawful detention of Robinette without any articulable reason.

The State of Ohio appealed the Second District's ruling to the Ohio Supreme Court. In a 4-3 decision, rendered on September 6, 1995, the Ohio Supreme Court affirmed the Court of Appeals. The Court further created a bright-line test to be applied when motorists are validly detained for traffic offenses. This test requires that the detaining officer clearly inform the motorist that he or she is legally free to go prior to engaging in any subsequent "consensual" interrogation.

ARGUMENT

This case does not primarily involve the consensual encounter doctrine, as urged by the State of Ohio and Amici States. Rather, it is a case in which law enforcement exceeded the permissible bounds of an investigative detention, thereby contravening this Court's prior pronouncements on the permissible scope of investigative detentions.

I. THE CONTINUED DETENTION OF MR. ROBINETTE WAS NOT REASONABLY RELATED IN SCOPE TO THE JUSTIFICATION FOR THE ORIGINAL TRAFFIC STOP.

The facts reveal that Deputy Newsome stopped Mr. Robinette for speeding. It is beyond dispute that this stop is an investigatory stop, previously held by this Court to constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). A traffic stop is more analogous to an investigative detention or "Terry stop" than a custodial arrest. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

The law with regard to investigatory stops was established by this Court in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968). The premise underlying *Terry* is that "in order to justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. This standard of reasonableness is imposed "upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions. . . . '" *Prouse*, 440 U.S. at 654 (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

Terry requires a dual analysis to determine: (1) whether the officer's action was justified at the inception of the stop, and (2) whether the officer's action at issue was reasonably related in scope to the circumstances

which justified the interference in the first place. *Id.* at 20; *see also Pennsylvania v. Mimms*, 434 U.S. 106, 113-14 (1977) (Marshall, J., dissenting). Evidence "may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 29.

It is conceded that the initial stop of Mr. Robinette was proper and comports with the first prong of the analysis in *Terry, supra*. Clearly, Mr. Robinette was speeding. He was "clocked" by Deputy Newsome traveling in excess of the posted speed limit and was validly detained for that reason. It is on the second prong of the *Terry* analysis, however, that the Deputy's conduct exceeded the justification for the original stop. From the inception of the stop, the officer testified that he was only going to issue a warning to Mr. Robinette. Therefore, when the Deputy returned to Mr. Robinette's vehicle after checking his license, he had fully investigated the violation and resolved the matter. All the Deputy needed to do was return Mr. Robinette's license and issue a warning. However, as noted by the Ohio Supreme Court:

> Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's driver's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette regarding whether he was carrying any contraband in the vehicle.
>
> . . . .

> The entire chain of events, starting when Newsome had Robinette exit the car and stand within the field of the video camera, was related to the questioning of Robinette about carrying contraband. Newsome asked Robinette to step out of his car for the sole purpose of conducting a line of questioning that was not related to the initial speeding stop and that was not based on any specific or articulable facts that would provide probable cause for the extension of the seizure of Robinette, his passenger and his car. ***Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle.***

See State v. Robinette, 73 Ohio St. 3d 650, 653 (1995) (emphasis added). In other words, the mere fact that Deputy Newsome initially had an articulable and reasonable suspicion that Mr. Robinette was speeding did not entitle him "to turn a routine traffic stop into a fishing expedition for unrelated criminal activity." *Id.* at 655. Nor does the fact that the deputy returned Mr. Robinette's license to him immediately prior to questioning him magically transform the initially valid traffic stop into a consensual encounter.

Deputy Newsome, in fact, had admitted to requesting consent to search vehicles "as a matter of course" in approximately 786 traffic stops in 1992 ***alone***. *State v. Retherford*, 93 Ohio App. 3d 586, 597 n.3 (1994). Mr. Robinette is but one of those stops. It does not take a mathematical genius to determine that this figure multiplied by the numerous law enforcement agencies and officers who utilize this same tactic yields a staggering number of citizens being "asked to relinquish their privacy rights in

the name of 'voluntary cooperation' with the government. . . . " *Id.*

The Ohio Supreme Court and Second Appellate District recognized the tactic of the Montgomery County Sheriff's Office (and the hundreds of other law enforcement agencies in Ohio and, perhaps, across the nation) for what it was. In the words of the Second Ohio Appellate District, the tactic is:

> merely a pre-arranged ploy to attempt to end the 'seizure' so that the Deputy could interrogate [Robinette] and obtain [his] consent to search based on nothing more than the slightest 'inchoate' and 'unparticularized' hunch that [he] might be transporting contraband.

Id. at 599. According to established Fourth Amendment jurisprudence, the Ohio Supreme Court was correct in holding that this pre-arranged ploy, resulting in the continued detention of Mr. Robinette, constituted an illegal seizure. *Robinette*, 73 Ohio St. 3d at 653.

Without missing a beat, however, Deputy Newsome continued to interrogate Mr. Robinette on videotape. Quite reasonably, Mr. Robinette, who moments earlier may have felt free to leave, felt constrained to answer the Deputy's questions. These answers culminated in his consent, obtained during the illegal detention, to search his vehicle. Because the consent was obtained pursuant to an illegal detention, Robinette's consent was invalid unless the State proved that it was the result of an independent act of free will on Robinette's part. *See Robinette*, 73 Ohio St. 3d at 654 (citing *Florida v. Royer*, 460 U.S. 491, 501 (1983)).

The similarities between this case and *Royer* are striking. In *Royer*, the detainee's airline ticket and license were retained by DEA agents while Royer was asked to accompany the officer's to an investigation room. *Royer*, 460 U.S. at 494. Mr. Robinette's license and registration were retained by Deputy Newsome, when he asked Mr. Robinette to exit his vehicle and stand in front of the police cruiser for the purpose of being videotaped. Royer's consent to search was obtained as a result of subsequent questioning during what this Court found to be an illegal detention exceeding the bounds of that approved in *Terry*. Likewise, Mr. Robinette's consent was obtained during an illegal detention exceeding the scope of the justification for the stop for speeding.

Royer clearly supports the holding of the Ohio Supreme Court that Mr. Robinette was being illegally detained at the point where he consented to the search of his vehicle. Thus, as in *Royer*, Mr. Robinette's "consent was tainted by the illegality and was ineffective to justify the search." *Royer*, 460 U.S. at 507-08.

II. THE REQUIREMENT OF ADVICE FROM A LAW ENFORCEMENT OFFICER TO A DETAINED MOTORIST AT THE CONCLUSION OF A TRAFFIC STOP THAT THE MOTORIST IS LEGALLY FREE TO GO IS NOT PROHIBITED UNDER THE FOURTH AMENDMENT.

In the courts below, Petitioner has consistently argued that the act of returning Mr. Robinette's license constituted the "bright line" between a valid detention and the claimed subsequent consensual encounter which resulted in consent to search Mr. Robinette's vehicle.

Now that the Ohio Supreme Court has seen fit to delineate a "bright line," by imposing a warning requirement upon law enforcement personnel in the limited context of motor vehicle stops, the State urges this Court to accept this case in order to rule that the Ohio Supreme Court has interpreted the constitutional guarantees of the Fourth Amendment too broadly so as to overprotect the citizens of Ohio. *See Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting).

Petitioner urges that one single factor cannot determine whether or not police contact is consensual or compelled. Amici States argue that no "prophylactic warning" must be given in order for police to engage in a consensual encounter. Amici States concede, however, that advice from a law enforcement officer as to a person's legal status may well be an appropriate component in the equation when considering whether consent is voluntary. Prior holdings of this Court are consistent with and bear out this principle.

For example, in *United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980), this Court opined that:

> [I]t is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require 'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search' [Schneckloth v. Bustamonte, supra], at 234 (footnote omitted), such knowledge was highly relevant to the determination that there had been consent. And, perhaps more important for present purposes, the fact that the officers themselves informed

> the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.

Likewise, in *Florida v. Bostick*, 501 U.S. 429 (1991) and *Florida v. Jimeno*, 500 U.S. 248 (1991), the detainees were advised of their right to refuse consent to search.

Petitioner relies upon the case of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), for the proposition that the government need not prove, as the *sine qua non* of effective consent that the subject of the search had a right to refuse. The case herein, however, does not fit squarely within the holding of *Schneckloth*. *Schneckloth* holds that the government need not, as part of its burden of proof, prove that the person giving consent knew that he or she had a right to withhold that consent. *Id.* at 249. Nothing in *Schneckloth* prohibits the imposition of a requirement on law enforcement personnel to inform a motorist that he or she is legally free to go at the conclusion of a valid traffic stop.

Nor does the imposition of such a requirement create an impermissible "per se" rule contrary to prior holdings of this Court. Both Petitioner and Amici States rely on *Bostick, supra*, and *Michigan v. Chesternut*, 486 U.S. 567 (1988), for the proposition that this Court has consistently rejected the importation of bright-line standards into Fourth Amendment analysis. This Court did strike down overbroad holdings of other state courts in these cases. However, these were cases in which the respective state court holdings involved all-or-nothing propositions of law. For example, in *Bostick*, this Court struck down the holding of the Florida Supreme Court that all bus

searches were unconstitutional. In *Chesternut*, this Court struck down a Michigan Court of Appeals' holding that all investigatory pursuits were seizures.

The holding of the Ohio Supreme Court is not this type of all-or-nothing proposition. The court did not state (as argued by Petitioner and Amici States) that a court's determination of whether or not an encounter is consensual will turn ***solely*** upon whether or not such a warning has been given. Indeed, the court had previously approved and followed the totality of circumstances standard set forth in *Schneckloth*. *State v. Childress*, 4 Ohio St. 3d 217 (1983) (syllabus at 1). The requirement of a statement informing a motorist that he is legally free to go is merely one more circumstance to be considered in the equation of totality of the circumstances.

The Ohio Supreme Court recognized that the continued detention of Mr. Robinette was unlawful, and that he and other Ohio citizens similarly situated may not be subjected to further unrelated investigation unless they are first advised that they are legally free to leave. The court expressly recognized "the need . . . to draw a bright line between the conclusion of a valid seizure and the beginning of a consensual exchange." *Robinette*, 73 Ohio St. 3d at 654. To hold otherwise would allow the State to "bear the poison fruits" of the unlawful detention.

The required statement is not overbroad, as it has been limited to the context of motorists who have been previously detained for traffic violations. Nor does the required warning place those who are validly detained for traffic violations in a superior position to those who have not been previously detained. This is not a case of

mere police questioning. Deputy Newsome did not just approach Mr. Robinette on a street somewhere, ask him if he would be willing to answer some questions, and then put some questions to him because he was willing to listen. *See Florida v. Royer*, 460 U.S. at 497. Rather, Newsome, knowing that the purpose of the stop had been completed, removed Mr. Robinette from his vehicle and placed him in a position to videotape further interrogation unrelated to the purpose of the original stop. It is this conduct which constitutes the unlawful detention that the Ohio Supreme Court correctly condemns.

Deputy Newsome did not ask Mr. Robinette if he was willing to answer questions. He simply asked the questions, clearly implying that Mr. Robinette had to respond ***before*** he could leave. *Robinette*, 73 Ohio St. 3d at 654-55; Appendix (*State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Transcript of Videotape, Joint Exhibit A, pages 3-4). Mr. Robinette's answer was not consensual; it was nothing more than a submission to a claim of lawful authority. As such, the Ohio Supreme Court recognized that it was insufficient as a matter of law to sustain Petitioner's burden that his consent was an act of free will. *See Bumper v. North Carolina*, 391 U.S. 543 (1968).

Amici States contend, and not surprisingly, that such a test irreparably interferes "with legitimate law enforcement techniques." This argument ignores the importance of an individual's Fourth Amendment right to be free of unreasonable searches and seizures. Consent implies that the individual has waived his right to be free of such a seizure or search. Requiring an officer to inform the detained motorist that he is free to leave does nothing

more than level the playing field. Indeed, the State of Ohio has done nothing more than guarantee to its citizens constitutional protection from unreasonable interference with their rights when such interference has no cognizable constitutional basis.

Further, although the Ohio Supreme Court interprets federal law in reaching its decision, it also predicates its decision upon Section 14, Article I of the Ohio Constitution. This section guarantees "the right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures . . . . " As previously held by the same court:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St. 3d 35 (1993) (syllabus at 1). The "bright line" set forth in *Robinette* does nothing more than afford greater protection to Ohio motorists.

It is not unreasonable under the Fourth Amendment to require that a State's sworn officers protect a citizen's constitutionally guaranteed rights. What is unreasonable and untenable is to urge ignorance of one's constitutional rights as an effective law enforcement tool. An individual cannot secure himself against what would otherwise be

an unreasonable seizure or search if he is totally ignorant of his right to decline and walk away. As stated by Honorable Justice Mr. Brennan: "It wholly escapes me how our citizens can meaningfully be said to have waived something so precious as a constitutional guarantee without ever being aware of its existence." *Schneckloth v. Bustamonte*, 412 U.S. at 277 (Brennan, J., dissenting).

CONCLUSION

The Fourth Amendment guarantee to be free from unreasonable searches and seizures must not be taken lightly. This Court has previously recognized that it is "not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.' " *Bostick*, 501 U.S. at 439.

The decision of the Ohio Supreme Court is correct. Mr. Robinette was detained so that the deputy could illegally broaden the scope of the initially valid stop to "fish" for information under the guise of a drug interdiction program. The warning requirement imposed by the court does not create an unconstitutional *per se* rule. It merely ensures that constitutional guarantees are not being swept away at the unfettered discretion of law enforcement officers. Thus, the warning does not eviscerate the consensual encounter doctrine, but merely clarifies its legality.

For these reasons, the Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

James D. Ruppert
1063 East Second Street
P.O. Box 369
Franklin, Ohio 45005
(513) 746-2832

Attorney for Respondent

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs- Case No. 92-CR-2800

ROBERT D. ROBINETTE,

Defendant.

TRANSCRIPT OF VIDEOTAPE

of JOINT EXHIBIT A, a videotape, in the proceedings that came before the Honorable John B. Kessler, Judge, on the 26th day of February, 1993.

HOOVER REPORTING
Susan C. Hoover, RPR
Troy, Ohio
(513) 335-3008

COMPUTER-AIDED TRANSCRIPTION

[p. 3] Interstate 70
Dayton, Ohio

August 3, 1992
8:30:22 p.m.

Dispatch: (Inaudible.)

Officer Newsome: What do you do for a living?

Mr. Robinette: I work for International Paper.

Officer Newsome: Okay.

Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Mr. Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.

One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?

Nothing like that? Okay.

[p. 4] Is all the luggage in there both yours and his? All of it? Okay.

Would you mind if I search your car? Make sure there's nothing in there?

Wouldn't have any problem with it?

Why don't you step up here on the passenger side, right up here. Come on over here. Come out, please. Okay.

If you would both of you stand about ten feet in front of your car there and face the other way.

Dispatch: (Inaudible.)

Officer Newsome: Little bit further, if you would.

Dispatch: (Inaudible.)

Officer Newsome: Move up a little bit further, if you would.

That's fine. Right there. Thanks.

(Searching.)

Dispatch: (Inaudible.)

Dispatch: 308. (Inaudible.)

Dispatch: (Inaudible.)

Officer Newsome: Is that all the marijuana you got?

Mr. Robinette: Console.

Officer Newsome: Okay.

* * *